RECORD AND BRIEFS

SUPREME COURT
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No. 16-499

In the
Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), this Court initially granted certiorari to consider whether the Alien Tort Statute, 28 U.S.C. §1350, provides jurisdiction for claims against corporations. After full briefing and oral argument, the Court ultimately declined to answer that question, instead holding that the claims in *Kiobel* failed under the presumption against extraterritorial application of U.S. law because the plaintiffs sought relief for "violations of the law of nations occurring outside the United States." 133 S. Ct. at 1669. This case, like *Kiobel*, involves an effort by foreign plaintiffs to recover damages from a foreign defendant for injuries suffered on foreign soil. Since *Kiobel*, a number of parties have sought certiorari on the original question presented in *Kiobel*, but this Court has uniformly denied those petitions, without noted dissent.

The question presented is:

Whether the ATS provides jurisdiction over claims by foreign plaintiffs against a foreign corporate defendant for injuries suffered in a foreign country, where the conduct in question does not violate any established norm of international law, the plaintiffs failed to adequately allege purpose or causation, and where plaintiffs chose not to avail themselves of a well-functioning judicial system in the foreign country where their injuries occurred.

PARTIES TO THE PROCEEDING

Respondent Arab Bank, PLC was the defendant in the district court and appellee in the Second Circuit.

Petitioners were plaintiffs in the district court and appellants in the Second Circuit. A full list of the approximately 6,000 petitioners was filed with the Clerk's Office on October 6, 2016.

CORPORATE DISCLOSURE STATEMENT

Arab Bank, PLC certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

Arab Bank is a leading financial institution headquartered in Jordan with operations throughout the world. The government of Jordan has emphasized that the Bank is a "pivotal force of economic stability and security" throughout Jordan and the Middle East. And the United States government has described the Bank as a "constructive partner" in the fight against terrorism financing and money laundering.

More than a decade ago, the Petitioners in these consolidated actions sued the Bank under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, seeking to hold the Bank liable for attacks in Israel perpetrated by Hamas and other groups and individuals over a ten-year period. There is no allegation that the Bank was involved in the planning, financing, or commission of the attacks that caused their injuries. Instead, Petitioners allege that the Bank provided financial services, such as holding accounts and clearing automated electronic wire transfers, for foreign individuals and charities that allegedly supported or maintained affiliations with terrorist organizations.

Although there were multiple grounds on which Petitioners' ATS claims could have been dismissed, the district court held that those claims failed because corporations are not proper ATS defendants under the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 135 (2d Cir. 2010) ("*Kiobel I*"). The Second Circuit panel affirmed on that basis. Pet.App.29a.

Petitioners now seek this Court's review solely on the question of whether the ATS "categorically forecloses corporate liability." Pet. i. The petition should be denied. Although this Court initially granted certiorari on the corporate-liability question in *Kiobel*, it subsequently resolved the case on the ground that the ATS does not reach "violations of the law of nations *occurring outside the United States*." *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013) ("*Kiobel II*") (emphasis added). This case likewise involves an effort by foreign plaintiffs to recover damages from a foreign defendant for injuries suffered abroad. Since this Court's decision in *Kiobel II*, the Court has denied multiple petitions raising the exact same question presented here, in cases arising out of the Second Circuit and elsewhere. Nothing has changed since those denials of certiorari that would warrant a different outcome here. Indeed, as four Second Circuit judges correctly recognized in their concurrence in the denial of rehearing, the corporate-liability question is of "sharply reduced" importance in the wake of *Kiobel II* because most ATS cases against corporations can now be dismissed on extraterritoriality grounds as well. Pet.App.42a.

If the Court were to grant certiorari in this case, it would be *Kiobel* all over again: the Court would quickly discover that there is no need to reach the question of corporate liability because Petitioners' ATS claims do not have a sufficient nexus to the United States to be litigated in U.S. court. Everything about this case is fundamentally foreign—it involves foreign plaintiffs suing foreign defendants for injuries that occurred on foreign soil

as part of a long-running conflict between foreign parties. And this case has profound implications for U.S. foreign policy and U.S. relations with critical allies such as Jordan. Allowing Petitioners' claims to proceed would interfere with the conduct of U.S. foreign policy and lead to the precise diplomatic friction that this Court sought to avoid in *Kiobel II*. As Judges Jacobs, Cabranes, Raggi, and Livingston correctly recognized in their concurrence in the denial of rehearing, this case could have been, should have been, and can be "straightforwardly decided under *Kiobel II*." Pet.App.38a.

In fact, there are even *stronger* grounds for dismissal here than in *Kiobel II* because it is undisputed that Petitioners could have sought relief under Israeli tort law. They chose to litigate in the U.S. not because the U.S. has any meaningful connection to this controversy, but solely because of the lure of punitive damages, which are rarely awarded in Israeli courts. This Court should not facilitate such transparent forum-shopping by reviving Petitioners' claims. Any further litigation of this dispute in U.S. court "would serve no purpose remotely commensurate with the effort it would entail." Pet.App.36a.

Even putting aside *Kiobel II*, there are multiple additional grounds on which Plaintiffs would lose even if corporations could be sued under the ATS. The ATS does not provide jurisdiction for claims based on acts of terrorism because there is no universally accepted definition of "terrorism" under international law. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013). Nor

can Plaintiffs plausibly allege the *specific intent* required for ATS claims, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), or a causal link between their injuries and any alleged violation of international law by the Bank, *see Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013).

* * *

In sum, after more than 10 years of litigation, Petitioners remain no closer than they were on day one to stating a viable claim under the ATS. The ATS's inapplicability to corporations is just the tip of the iceberg in terms of the legal defects of Petitioners' claims. Petitioners offer no plausible basis to extend this litigation further in order to address a question of diminishing importance on which this Court has repeatedly denied certiorari. The petition should be denied.

STATEMENT OF THE CASE

A. Arab Bank's Critical Role in Economic Development and Anti-Terrorism Efforts

Respondent Arab Bank is the largest bank in the Kingdom of Jordan, where it is incorporated and headquartered. It operates in nearly 30 countries, including the United States. For decades, the Bank has been recognized as a "best" institution by industry publications. *See* Global Finance, *Best Banks By Region 2016* (Mar. 15, 2016), http://bit.ly/1q2z4B7; Global Finance, *Best Banks in Jordan 2003* (Oct. 1, 2003), http://bit.ly/2htLGOF. The Kingdom of Jordan has described the Bank as a "pivotal force of economic stability and security in

[Jordan] and the broader region." C.A.App.1025, 1054-55.[1]

Arab Bank is also the largest financial institution in the Palestinian Territories, where it has been a development partner with the U.S. Agency for International Development, OXFAM, Save the Children Fund, Catholic Relief Services, and many other groups. C.A.App.929-30, 1055. Indeed, the Bank is "the main vehicle for ... payments by the international donor community" to Palestinian organizations, and is also used by the Israeli government, which transfers customs and tax revenues collected for the benefit of the Palestinian Authority to accounts maintained by the Bank. *Id.*

The Bank is deeply committed to fighting the scourge of terrorism. The United States government has described the Bank as a "constructive partner" in "working to prevent terrorist financing," and has praised the Bank as a "leading participant" in "regional forums on anti-money laundering and combatting the financing of terrorism." Br. of United States at 20, *Arab Bank v. Linde*, No. 12-1485 (U.S. filed May 23, 2014) ("U.S. *Linde* Br.").

For example, outside the U.S., the Bank fully complies with the legal requirements of the countries in which it operates. In particular, it performs necessary due diligence on prospective customers, and screens account applicants against blacklists

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[1] Unless otherwise noted, citations to C.A.App. refer to the appendix in the Second Circuit, and citations to *Linde*.C.A.App. or *Linde*.SPA refer to the joint appendix and special appendix in the parallel Second Circuit case *Linde v. Arab Bank*, No. 16-2119.

provided by local regulatory authorities. It was one of the first banks in the Middle East to introduce technology allowing local branches to screen customer names against the U.S. Office of Foreign Assets Control ("OFAC") "blacklist," even though OFAC regulations have never required foreign entities to apply such scrutiny. *See Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 565 (E.D.N.Y. 2012).

In the U.S., the Bank operated through its New York Branch (Arab Bank New York ("ABNY")), whose systems were specifically designed to comply with regulations prohibiting U.S. branches of foreign banks from engaging in transactions with individuals and entities on the OFAC blacklist. In addition to those computerized safeguards, ABNY also maintained a dedicated Compliance Department to oversee compliance with U.S. regulations and to develop and implement policies designed to curb money laundering and terrorism financing.

B. Petitioners' Fundamentally Foreign Allegations Against Arab Bank

Petitioners are foreign citizens who were victims of attacks perpetrated in Israel by Hamas and other foreign individuals and organizations over a ten-year period. Yet Petitioners have not sued any terrorists, terrorist groups, or their financial backers. Nor have they sought relief in Israel, the location of the attacks, even though Israel has a well-functioning tort regime. Instead, they brought claims against Arab Bank in U.S. court under the ATS seeking relief for their foreign injuries that occurred on foreign soil.

Petitioners do not allege that the Bank was involved in planning, funding, or committing the attacks that caused their injuries. At most, Petitioners allege that the Bank maintained accounts and processed transactions for foreign persons and charities affiliated with foreign terrorist organizations. But they do not allege any link between the Bank's activities and *the specific attacks that caused their injuries*. They instead contend that the Bank's alleged provision of *general assistance* in the form of financial services to foreign persons affiliated with, or related to, foreign terrorists is sufficient to give rise to liability under the ATS.

None of this has anything to do with the United States. Every bank account referenced by Petitioners was held in a foreign country, and every transaction in question was initiated or received by a foreign party. *No account at issue was held by ABNY.* ABNY performed ministerial dollar clearing services—typical of those performed by all U.S. correspondent banks—involving transactions that merely *transited* the United States while en route from a foreign sender to a foreign recipient. While passing through the U.S., those transactions were processed electronically, without human intervention, through an automated clearing system that also screened the names of the parties involved against the OFAC "blacklist."[2]

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[2] Although Petitioners single out ABNY, many of the transactions in question also transited through, and passed the OFAC compliance checks of, other major U.S. financial institutions. *Linde*.C.A.App.584, 650, 763, 864, 1189, 1199, 7115-17, 7122.

Petitioners' discussion of the Bank's conduct rests on a skewed and highly selective description of the factual record. For example, Petitioners assert (at 5-6) that the Bank "maintained accounts for numerous well-known leaders of Hamas." But nearly all of the referenced individuals have never been designated as terrorists by the U.S. government (even to this day). And it is undisputed that all of those accounts were held *in foreign countries*. C.A.App.203-07.

Straining to create a U.S. nexus, Petitioners further assert (at 6-7) that the Bank's "New York branch" processed more than $121 million in transactions "in aid of Palestinian terrorists." But, with just four exceptions (out of the approximately 500,000 transactions the branch processes annually), none of the identified transactions involved designated terrorists or entities on the OFAC blacklist.[3] Those transactions were initiated by foreign parties located in foreign countries, for the benefit of other foreign parties, and merely passed through the Bank's automated electronic funds clearing facilities in New York as they would through any correspondent bank. C.A.App.203-07; *see also supra* n.2. And Petitioners do not allege that any of

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[3] In two of the four instances, ABNY's software automatically processed the transactions because the names of the transaction parties did not match the names on any government terrorist watch-list. *See Linde*.C.A.App.6950, 580-83, 796. The other two transactions, involving a U.K.-licensed and headquartered charity, were erroneously released after being mistaken for false-positive OFAC matches. *See Linde*.C.A.App.6771-72. The Bank self-reported this incident to U.S. authorities, which took no further action against the Bank. *Id.*

those transactions had any connection to the specific attacks that caused their injuries.

Petitioners (at 6) also make the misleading assertion that the Bank "admitted" that it "processed 282 funds transfers" for individuals that the United States had designated as terrorists. But, with the exception of the four transfers discussed above, those 282 transfers never transited through the U.S and did not even involve U.S. currency. Instead, they occurred *entirely outside the United States*, in countries where the individuals in question were *not* designated as terrorists at the time of the transfers. *Linde*.C.A.App.7033-34.

Finally, Petitioners assert (at 7-8) that the Office of the Comptroller of the Currency ("OCC") and other regulators found that the Bank's activities posed a risk of transferring money to suspected terrorists. But OCC explicitly found that the Bank did not engage in any knowing wrongdoing. To the contrary, OCC found that the Bank "largely complied with the requirement to cease clearing funds transfers once the [Treasury Department] designated an entity as a 'specially designated terrorist,' 'specially designated global terrorist,' or 'foreign terrorist organization.'" *Gill*, 893 F. Supp. 2d at 566.

C. Proceedings Below

1. Multiple sets of plaintiffs filed complaints against the Bank between 2004 and 2010. Each complaint made essentially the same allegations about the Bank's conduct, and asserted one or both of (1) claims by foreign nationals under the ATS; or (2) claims by U.S. nationals under the Anti-Terrorism Act, 18 U.S.C. §2333 ("ATA").

Beginning in July 2005, the Bank filed motions to dismiss the foreign plaintiffs' ATS claims, arguing that (1) "terrorism" had not been sufficiently defined by the international community to be cognizable under the ATS; (2) Plaintiffs had not pled the requisite *mens rea*; and (3) Plaintiffs' claims were barred as an impermissible extraterritorial application of U.S. law. *See, e.g.*, Mot. to Dismiss, *Lev v. Arab Bank*, No. 1:08-cv-3251 (E.D.N.Y. Dec. 15, 2008). The district court initially denied the Bank's motions. *See, e.g.*, C.A.App.783-84.

After the Second Circuit's 2010 decision in *Kiobel I*, the Bank attempted to renew its motion to dismiss, but the district court stayed that motion pending this Court's decision. After this Court's decision in *Kiobel II*, the Bank filed a renewed motion to dismiss, arguing that Petitioners' claims were subject to dismissal under both *Kiobel I* and *Kiobel II*. In August 2013, the district court granted the Bank's renewed motion and dismissed the ATS claims on the basis of *Kiobel I*.

2. Petitioners appealed. The Bank argued to the Second Circuit that the judgment should be affirmed for any or all of the reasons pressed below, including the lack of corporate liability under the ATS, the fact that Petitioners allege purely extraterritorial conduct in violation of this Court's holding in *Kiobel II*, and the absence of any universal international norm against "terrorism." Indeed, even Petitioners' counsel acknowledged at oral argument that the record was sufficiently complete to allow the court to rule on the extraterritoriality issue under *Kiobel II*. *See* Tr. of Oral Arg. at 4-5 ("[T]here's sufficient

evidence in the record for this Court to" decide the *Kiobel II* issue, and "this Court has ... taken the opportunity to reach that question when it's been posed, irrespective of the question of corporate liability."). The Second Circuit panel found it "tempting to ... affirm[] the district court's judgments on the basis of *Kiobel II*['s]" rule against extraterritorial application of the ATS, but ultimately affirmed on the basis of *Kiobel I*'s no-corporate liability rule. Pet.App.28a-29a.

Petitioners sought rehearing en banc, urging the full Second Circuit to address an alleged circuit split over whether corporations can be held liable under the ATS. The court denied the petition.

In an opinion concurring in the denial of rehearing, Judge Jacobs (joined by Judges Cabranes, Raggi, and Livingston) faulted the panel for "steer[ing] deliberately into controversy" by affirming solely on the basis of *Kiobel I* in an effort to have that precedent overruled en banc or by this Court. Pet.App.40a-42a. The concurring judges explained that the importance of the no-corporate-liability rule set forth in *Kiobel I* has been "sharply eroded" because many ATS claims against corporations can now be dismissed under *Kiobel II*'s holding that the ATS does not apply to conduct that occurred in a foreign country. Pet.App.37a. According to those judges, this appeal "could have been straightforwardly decided under *Kiobel II*" because this case involves foreign plaintiffs suing a foreign defendant for foreign torts, and Arab Bank's "mere corporate presence" in New York is insufficient to rebut the presumption against extraterritoriality.

Pet.App.38a-39a. Finally, even in the "(unlikely) event that plaintiffs could somehow plead around *Kiobel II*," the concurring judges concluded that Petitioners had failed to adequately allege that the Bank acted with the *purpose* of violating international law. Pet.App.39a.

REASONS FOR DENYING THE PETITION

I. Petitioners argue that it is "crucial" for this Court to resolve a "firmly entrenched" circuit split on the question of whether corporations can be sued under the ATS. But since declining to address that question in *Kiobel*, this Court has had at least three opportunities to address the exact question presented here—in petitions filed by both plaintiffs and defendants, and in cases from both the Second Circuit and other circuits—yet has denied each of those petitions, without noted dissent. Petitioners identify no intervening development or unique feature of this case that has suddenly made this issue become certworthy.

This Court's repeated denial of certiorari on the ATS corporate-liability issue is unsurprising, as that question is of significantly diminished importance in the wake of this Court's decision in *Kiobel II*. As in *Kiobel* itself, many ATS claims against corporations can now be, and have been, dismissed on extraterritoriality grounds regardless of whether the ATS reaches corporations.

That is precisely the case here. Petitioners' ATS claims are paradigmatic "foreign-cubed" claims in which foreign plaintiffs have sued a foreign defendant for injuries that occurred on foreign soil. And sensitive foreign policy considerations pervade

every aspect of this case. Petitioners' ATS claims arise out of the Israeli-Palestinian conflict, and ask the U.S. federal courts to wade into that fraught and diplomatically sensitive dispute. This case has *already* led to significant diplomatic friction between the U.S. government and close allies such as Jordan over the plaintiffs' request for confidential records located in foreign countries whose disclosure would violate those countries' banking laws. Allowing Petitioners' ATS claims to proceed would invite the precise diplomatic and foreign policy harms that *Kiobel II* and the presumption against extraterritoriality seek to avoid.

Any interest in having U.S. courts adjudicate these claims is also *de minimis* because Petitioners failed to exhaust legal remedies in Israel, the country where they resided and their injuries actually occurred. Rather than bringing suit in that obvious forum, Petitioners chose to litigate in the United States in an attempt to obtain punitive damages (which are rarely awarded under Israeli law). This Court should not facilitate Petitioners' use of the ATS for such blatant forum-shopping.

This Court's review is also unnecessary because the decision below is correct. There is currently no consensus that corporations can be found liable under international law, which is fatal to Petitioners' ATS claims. No less an authority than the U.N. Council on Human Rights has recognized that international law does not currently impose any direct legal responsibilities on corporations. Petitioners and their amici are also wrong to suggest that the decision below will make it more difficult to

combat terrorism. Regardless of any potential ATS claims, corporations will remain subject to an exhaustive array of statutes and regulations designed to prevent the flow of money to terrorist groups, including the material support statute, the Patriot Act, the OFAC sanctions regime, the Anti-Terrorism Act, and countless regulations imposed by foreign and domestic banking regulators.

II. This Court's review would also be an exercise in futility because—in addition to being barred by *Kiobel II*—Petitioners' ATS claims fail as a matter of law for several other independent reasons.

The ATS provides jurisdiction only for claims alleging "violations of international law norms that are 'specific, universal, and obligatory.'" *Kiobel II*, 133 S. Ct. at 1665. Petitioners seek to advance ATS claims based on the Bank's alleged facilitation of "terrorism," but there is nothing remotely resembling a *universal* international consensus about the meaning of that term. Even preeminent international organizations such as the U.N. and NATO have struggled to define that term with any consistency. This case well-illustrates that ongoing ambiguity. Several of the Palestinian organizations and charities that Petitioners have labeled as "terrorists fronts" receive funding or support *from the U.S. government.* And the vast majority of Bank customers whom Petitioners claim are terrorists were never designated as such by any country or organization, including the U.S., E.U., and U.N. The inherent difficulty in defining "terrorism"—and the fact that any such determination is fraught with sensitive foreign-policy implications—only

underscores why the ATS should not be dramatically expanded to encompass Petitioners' claims.

Finally, Petitioners' ATS claims fail as a matter of law because they do not plausibly allege the critical elements of *purpose* and *causation*. It strains credulity to suggest that a major international financial institution that the U.S. government has described as a "leader" and "constructive partner" in combatting terrorist financing, and that Israel uses to make payments of the customs and tax revenue it collects, acted with the purpose of assisting terrorist attacks. And Petitioners' complaints are wholly devoid of any allegations establishing a causal connection between the Bank's activities and the attacks that caused their injuries. Each of these omissions provides yet another independent basis on which Petitioners' ATS claims can be dismissed regardless of how this Court would answer the question presented.

I. The Decision Below Was Correct And Is Of Minimal Practical Importance.

A. This Court Has Recently and Repeatedly Denied Certiorari on the Exact Question Presented Here.

Over the last two years, this Court has denied multiple petitions for certiorari raising the exact question presented here. Petitioners offer no reason for a different result this time around.

In *Ntsebeza v. Ford Motor Co.*, No. 15-1020, a case arising out of the Second Circuit, the petitioners raised the question of "[w]hether corporations are immune from tort liability under the ATS..." Pet. for Cert. at ii, No. 15-1020 (filed Feb. 10, 2016).

According to the petitioners, the Second Circuit "stands alone amongst all circuits to have considered the issue of corporate liability under the ATS." *Id.* at 37. Citing the exact same cases that Petitioners cite here, the *Ntsebeza* petitioners argued that four other circuits "have each independently concluded that corporate liability exists," and that "[r]eview is warranted to resolve this conflict among the appellate courts regarding corporate liability under the ATS." *Id.* at 38. In other words, *Ntsebeza* arose out of the same circuit as this case; raised the same question presented; and cited the same cases in support of an alleged split. This Court denied certiorari on June 20, 2016, without noted dissent. Petitioners do not even acknowledge this recent denial of certiorari on the same question presented here, much less attempt to explain why this issue has suddenly become certworthy just six months later.

Ntsebeza was not an outlier, as this Court also recently denied certiorari in a case arising out of the Ninth Circuit that raised the same question. In that case, the petitioners (corporate defendants rather than individual plaintiffs) sought certiorari on the question of "whether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations." Pet. for Cert. at i, *Nestle v. Doe*, No. 15-349 (filed Sept. 18, 2015). Citing the same court of appeals cases cited by Petitioners here, the petitioners in that case urged the Court to "resolve the persistent conflict among the courts of appeals regarding corporate liability under the ATS." *Id.* at 34. This Court denied certiorari on January 11, 2016, again without noted dissent.

The Court has also denied certiorari in cases in which *respondents* raised this issue as a potential defense to liability. In *Cardona v. Chiquita Brands*, Nos. 14-777, 14-1011, the petitioners sought certiorari on a question about the extraterritorial scope of the ATS. The respondents argued that if the Court were to grant certiorari, it should add a question presented to "consider the issue of corporate liability" under the ATS and thereby "resolve the circuit split" between the Second Circuit and three other courts of appeals. Br. in Opp. at 28-30, Nos. 14-777, 14-1011 (filed Mar. 6, 2015). This Court denied certiorari on April 20, 2015, without noted dissent.

In sum, over the last two years, this Court has declined at least three invitations to consider the exact same question presented here, in petitions filed by plaintiffs and defendants, and in cases arising out of the Second Circuit and other courts of appeals. That is hardly surprising given that this Court previously went out of its way to avoid deciding the question in *Kiobel* even after full briefing and argument on the merits. Nothing has changed since *Kiobel* and the subsequent denials of certiorari that would warrant a different outcome here, and petitioners do not even attempt to argue otherwise.

B. The Question Presented Is of Minimal and Diminishing Practical Importance in Light of *Kiobel II*.

1. As Petitioners repeatedly note, this Court initially granted certiorari in *Kiobel* to address the question of whether corporations can be sued under the ATS, before ultimately resolving the case on

other grounds. But, far from suggesting a lingering need for this Court's review of the corporate-liability issue, this Court's decision in *Kiobel II* only underscores why that issue is now a question of minimal and diminishing importance that does not warrant this Court's intervention.

This Court initially granted certiorari in *Kiobel* to address whether the law of nations recognized corporate liability and, in turn, whether the ATS provided jurisdiction for claims against corporations. After full merits briefing and argument on that question, the Court requested supplemental briefing and argument to address an additional question: "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." 132 S. Ct. 1738 (2012).

The Court ultimately resolved the case "based on our answer to the second question." 133 S. Ct. at 1663. As the Court explained, the longstanding presumption against extraterritorial application of U.S. law "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 1664. And those concerns about interfering with U.S. foreign policy were only "magnified" in the context of the ATS, as "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004)); *see id.* at

1673-74 (Breyer, J., concurring) ("*Sosa*'s basic caution" is "to avoid international friction....").

The Court further held that nothing in the sparse text of the ATS rebutted the presumption against extraterritoriality. The concerns that led the First Congress to enact the ATS involved purely *domestic* torts and "provide[d] no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad." *Id.* at 1667.

The Court thus concluded that the ATS does not provide jurisdiction over claims "seeking relief for violations of the law of nations occurring outside the United States." *Id.* at 1669. And even where claims "touch and concern the territory of the United States, they *must do so with sufficient force* to displace the presumption against extraterritorial application." *Id.* (emphasis added). Corporations are "often present in many countries," and "it would reach too far to say that mere corporate presence suffices." *Id.*

2. Petitioners suggest (at 14) that this Court's previous grant of certiorari on the corporate-liability question shows that this issue is "extraordinarily significant." But the Court's ultimate disposition of *Kiobel* shows exactly the opposite: that it is *unnecessary* to address questions of corporate liability when an ATS suit can easily be dismissed on extraterritoriality grounds. As Judges Jacobs, Cabranes, Raggi, and Livingston recognized in their concurrence in the denial of rehearing, the question of corporate liability under the ATS "has been largely overtaken" in light of this Court's decision in *Kiobel II*. Pet.App.37a. Given that many ATS claims are

both brought against corporations *and* involve extraterritorial conduct, "the population of cases dismissible under *Kiobel I* is largely coextensive with those dismissible under *Kiobel II*." *Id.*

For the same reason, the circuit split alleged in the Petition—which is "illusory," as Judge Jacobs explained, Pet.App.41a—is of minimal and diminishing practical importance. Since *Kiobel II*, even the courts that purportedly allow corporate liability under the ATS have routinely dismissed ATS claims against corporations on extraterritoriality grounds, including ATS claims brought against *U.S. corporations* accused of providing support to terrorists *from their U.S. offices*. *See, e.g.*, *Doe v. Drummond Co.*, 782 F.3d 576, 593-601 (11th Cir. 2015), *cert. denied* 136 S. Ct. 1168 (2016); *Baloco v. Drummond Co.*, 767 F.3d 1229, 1236-39 (11th Cir. 2014), *cert. denied* 136 S. Ct. 410 (2015); *Cardona v. Chiquita Brands*, 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015); *see also Mujica v. AirScan*, 771 F.3d 580, 591-96 (9th Cir. 2014), *cert. denied* 136 S. Ct. 690 (2015). Indeed, Petitioners have not identified a single post-*Kiobel* case in *any* circuit in which a corporation has actually been found liable for violating the ATS, thereby underscoring that the corporate-liability question is having little, if any, practical impact on the lower courts.

C. Petitioners' Claims Are Foreclosed by *Kiobel II*.

1. Just as in *Kiobel* itself, even though this case involves an ATS claim against a corporation, it can also be "straightforwardly decided" under the

presumption against extraterritoriality. Pet.App.38a. Every pertinent aspect of this case is foreign. Petitioners are foreign citizens—including soldiers in a foreign nation's military—whose injuries occurred on foreign soil at the hands of the foreign individuals and organizations that perpetrated the attacks. The defendant, Arab Bank, is a Jordanian-headquartered financial institution. Although the Bank has an office in the U.S. (like Royal Dutch Shell in *Kiobel*), its headquarters and virtually all of its operations are located abroad. In short, just like *Kiobel II*, this is a paradigmatic "foreign-cubed" case in which a foreign plaintiff is suing a foreign defendant for injuries suffered on foreign soil.

Indeed, the Bank's connections to the U.S. are even more attenuated than those in *Kiobel*. There, the defendant raised funds in the United States, its shares were traded on the New York Stock Exchange, and the company maintained such extensive operations in New York that it was found to be subject to the general jurisdiction of the U.S. courts. 133 S. Ct. at 1662-63, 1677-78 (Breyer, J., concurring); *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-99 (2d Cir. 2000). None of that is true here. Arab Bank's shares are not traded in the U.S.; the company has never sought to raise funds in the U.S.; only a handful of its approximately 6,000 employees are located in the U.S.; and it has never been deemed subject to general jurisdiction here.

The Second Circuit panel found it "tempting" to decide this case on extraterritoriality grounds but ultimately declined to do so. Pet.App.28a. In particular, the panel stated that it would be "unwise"

to decide "the difficult and sensitive question" of whether *Kiobel II* applied here given that the Bank allegedly "clear[ed] foreign dollar-denominated payments through a branch in New York." *Id.*

In fact, that issue is neither "difficult" nor "sensitive." As this Court emphasized in *Kiobel II*, even where claims "touch and concern the territory of the United States, they *must do so with sufficient force* to displace the presumption against extraterritorial application." 133 S. Ct. at 1669 (emphasis added). The fact that a wire transfer of funds between a foreign sender and foreign recipient—the "kind of transaction that can be done at an automated airport kiosk," Pet.App.40a—may have transited the automated clearing system of a New York bank branch (without human intervention) at some point on its journey between those foreign countries does nothing to change the *fundamentally foreign* character of such a transaction.

Indeed, it would be nothing short of radical to hold that this highly attenuated link to the U.S. can provide jurisdiction over an otherwise-impermissible foreign-cubed ATS claim. The dollar is the world's reserve currency, and dollar-denominated transactions are cleared through the U.S. at a rate of more than $1.5 trillion each day. If that alone were sufficient to displace the presumption against extraterritoriality and trigger ATS jurisdiction in the United States, then any alleged violation of international law anywhere in the word "in which dollars are involved" would "belong[] in ... New York courts." *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 12 N.E.3d 456, 460 (N.Y. 2014).

Under that sweeping view of ATS jurisdiction, this Court's extraterritoriality doctrine would be a dead letter in any case involving a wire transfer that happened to be denominated in dollars.

In all events, Petitioners have never alleged that any of the transactions that passed through ABNY's automated clearing system were connected to *the specific attacks that caused their injuries*. Thus, even if dollar clearing through a bank's New York branch could give rise to an ATS claim under some hypothetical set of circumstances, it emphatically cannot do so here.

2. This Court further emphasized in both *Kiobel II* and *Sosa* that ATS claims should not be recognized by the courts where doing so would "raise risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 727-28. The risk of interfering with sensitive foreign policy judgments or causing international friction is especially severe in cases, like this one, that involve "conduct within the territory of another sovereign." *Kiobel II*, 133 S. Ct. at 1665; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (presumption against extraterritoriality "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord"). Here, Petitioners' ATS claims implicate an abundance of sensitive foreign policy concerns and have *already* interfered with diplomatic relations between the U.S. and its critical allies in the Middle East.

At the outset, allowing Petitioners' ATS claims to proceed would result in U.S. federal courts becoming the next battlefield in the Israeli-Palestinian

conflict—a role the courts are manifestly unsuited to play. Due in large part to the sensitive foreign policy interests at stake, U.S. courts have wisely steered clear of adjudicating disputes arising out of the Israeli-Palestinian conflict. *See, e.g., Corrie v. Caterpillar Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (affirming dismissal where adjudicating the case could "undermine foreign policy decisions in the sensitive context of the Israeli-Palestinian conflict"); *Doe I v. Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005) (affirming dismissal after concluding that a determination of whether violence perpetrated by Israeli settlors constituted "genocide" was a "predicate policy determination" that "is plainly reserved to the political branches of government"); *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007) (dismissing claims after observing that ATS plaintiffs were injured in a "uniquely volatile region" and stating that the court could not "ignore the potential impact of this litigation on the Middle East's delicate diplomacy"), *aff'd* 563 F.3d 9 (2d Cir. 2009).

Moreover, if Petitioners' ATS claims were allowed to proceed, the discovery process would lead to a host of cross-border conflicts over access to the Bank's records. This is not speculation. During the discovery process (which was consolidated in the ATA and ATS cases), Petitioners and other plaintiffs made a stunningly broad request for essentially all documents related to tens of thousands of the Bank's foreign accounts, without regard to whether those accounts had any alleged links to terrorism. *Linde*.C.A.App.3294. The Bank secured permission to lawfully produce approximately 200,000 foreign

account records. But complying with Petitioners' additional discovery requests would have forced the Bank to violate the laws and express directives of the many other jurisdictions in which it does business.

Yet, remarkably, the district court in the ATA case imposed a draconian sanction on the Bank for its failure to fully comply with the plaintiffs' discovery requests, even after the sanction order prompted a petition to this Court, an amicus brief by the Kingdom of Jordan, a call for the views of the Solicitor General, and a U.S. government brief explaining that the sanctions order was legally erroneous and diplomatically prejudicial.[4] None of that impressed the district court (which also has jurisdiction over these proceedings). The sanction effectively crippled the Bank's ability to mount a meaningful defense to the ATA claims by gagging it from explaining why it was unable to produce additional records, and instructing the jury that it could infer that the Bank "provided financial services to Hamas, and to individuals affiliated with Hamas," and that the Bank "did these acts knowingly." *Linde*.SPA143.[5]

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[4] *See* Br. of Jordan at 2-4, *Arab Bank v. Linde*, No. 12-1485 (filed July 24, 2013) (sanction order was a "grave affront to [Jordan's] sovereignty" that undermines its "right to prescribe and enforce laws within its territory"); U.S. *Linde* Br. at 8, 19 (sanction order "fail[ed] adequately to consider the broad range of United States foreign-relations and anti-terrorism interests" implicated by this case).

[5] In the face of this instruction and the exclusion of evidence of the Bank's compliance efforts and lawful intent, the jury unsurprisingly returned a verdict finding the Bank liable under the ATA for all 24 attacks at issue in the trial. *Linde*.SPA161-

In short, adjudication of Petitioners' ATS claims would inject U.S. courts squarely into the middle of the Israeli-Palestinian conflict, would interfere with U.S. relations with critical allies in the Middle East, and would risk forcing the Bank to violate the local laws of the many foreign countries in which it operates. Those are precisely the types of harms that this Court sought to prevent in its decisions in *Kiobel II* and *Sosa*. Allowing Petitioners' ATS claims to proceed has nothing to recommend it, and further review "would serve no purpose remotely commensurate with the effort it would entail." Pet.App.36a.

3. Finally, further underscoring that this case does not belong in U.S. court, Petitioners unquestionably had legal remedies available to them in Israel—the site of the attacks—which they strategically chose not to pursue. Israel has a modern, well-functioning tort regime, and it is undisputed that Petitioners could have sued Arab Bank (or any other individual or corporation allegedly connected to the attacks) in an Israeli court.

Yet Petitioners instead chose to litigate 5,000 miles away, in U.S. federal district court. In response to questions about why they did not sue the Bank (or their attackers) in Israel, Petitioners' counsel candidly stated:

> The answer is simple: ... [Y]ou cannot compare the amounts that could be awarded in America in tort cases to anything we

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64. The Bank's appeal from that judgment is pending in the Second Circuit. *See Linde v. Arab Bank*, No. 16-2119 (2d Cir.).

> know here [in Israel]. In the U.S., ... in addition to the damage compensation, *there are also enormous punitive awards, and I am talking millions.*

C.A.App.310 (emphasis added). In other words, Petitioners chose to pursue their claims in the U.S. not because of some nexus between their allegations and the U.S., but because U.S. tort law is more generous than Israeli tort law in providing for punitive damages.

Petitioners' failure to pursue available remedies in Israel is yet another reason why their ATS claims fail. In *Sosa*, this Court cited with apparent approval an amicus brief and international law treatise arguing that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant *must have exhausted any remedies available in the domestic legal system.*" *Sosa*, 542 U.S. at 732 n.21 (emphasis added); *accord Kiobel II*, 133 S. Ct. at 1677 (Breyer, J. concurring) (noting availability in ATS cases of doctrines of "comity, exhaustion, and *forum non conveniens*"). The mere fact that the remedies available in Israel—Petitioners' home country—are less generous than those available in the U.S. is no reason to allow them to seek relief in the U.S. under the ATS for fundamentally foreign claims.

D. The Decision Below Was Correct and Will Not Undermine Efforts To Combat Terrorism.

1. To succeed on their ATS claims against the Bank, Petitioners would bear a heavy burden to show that corporate liability is *universally recognized* in

international law. *See Sosa*, 542 U.S. at 733 n.20. Yet Petitioners fail to point the Court to a single instance of a corporation being held liable by an international tribunal under customary international law. There is none. As the U.N. Council on Human Rights has recognized, "[i]ndividuals have long been subject to direct responsibility for ... international crimes [such as] piracy and slavery...."[6] But, within the world's various legal systems there is "enormous diversity in the scope and content of corporate legal responsibilities regarding human rights." *Id.* ¶34. Thus, international law does not "currently impose direct legal responsibilities on corporations." *Id.* at ¶44.

Historical practice confirms the lack of any universal norm recognizing corporate liability. At the Nuremberg Trials, the Allies "declin[ed] to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while [nevertheless] prosecuting the men who led" it. *Kiobel I*, 621 F.3d at 135. As the Nuremberg Tribunal emphasized, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nurnberg Trial 1946*, 6 F.R.D. 69, 110 (1947). All subsequent international tribunals have followed that example. The jurisdiction of the International

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[6] U.N. Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. ¶19. U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court are all limited to "natural persons." *Kiobel I*, 621 F.3d at 136.

Petitioners assert (at 26) that *Skinner v. East India Co.*, a 17th-century suit against the British East India Company, demonstrates that corporations could be sued under international law at the time the ATS was enacted in 1789. But the East India Company was much more like a modern sovereign, complete with the power "to wage war and conduct diplomacy, govern over people and places, [and] coin money," than to a purely private corporation. *See* Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 Seattle U. L. Rev. 423, 433 (2016).

Petitioners' argument (at 27-29) that once a violation of international law has been established, U.S. domestic law can provide the remedy of corporate liability for that violation is wrong. Under normal choice-of-law rules, the types of defendants who may be held liable for violating a legal rule is a question of *substance*, not procedure. *See, e.g.*, Peter Hay, Conflict of Laws §1.1 (5th ed. 2010). Here, the ATS selects the "law of nations" to provide the substance, including the answer to who may be found liable. *See Sosa*, 542 U.S. at 733 n.20.

Regardless, U.S. law does *not* permit corporate liability in several analogous contexts, and Petitioners offer no plausible basis for recognizing a broader cause of action under the ATS. For example, this Court has held that corporations cannot be found liable in a *Bivens* action for claims arising from the

violation of domestic civil rights. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001). And the Torture Victim Protection Act—which is codified as a note to the ATS and provides a specific remedy for "torture" and "extrajudicial killing"—bars liability for corporations. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706 (2012).

2. Amici's suggestion that the decision below will "create a troubling gap in U.S. global counterterrorism efforts," Whitehouse Br.18-20, is pure hyperbole. Federal criminal law separately forbids providing material support to terrorist groups. *See, e.g.*, 18 U.S.C. §§2339A-2339C. The Patriot Act, sanctions programs administered by OFAC, and other banking regulations also prevent the use of the U.S. financial system by terrorists, and punish banks that fail to comply. *See e.g.*, 31 C.F.R. §§595-597. Critically, each of those governmental remedies allows for prosecutorial or regulatory discretion in an area fraught with foreign policy considerations to which the plaintiffs' bar in a private suit will pay no heed. *See RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2106 (2016); *Sosa*, 542 U.S. at 727.

The civil Anti-Terrorism Act also creates liability for *anyone*—including corporations—who commits "acts of international terrorism." 18 U.S.C. §2333. Indeed, Petitioners' co-plaintiffs are currently suing the Bank under the ATA for some of the very same attacks at issue here. The Bank continues to mount a vigorous defense to those claims, but its status as a corporation is no defense in that action. The only reason Petitioners are suing under the ATS is

because Congress has permitted only "national[s] of the United States" to sue under the ATA. Even though Congress recently expanded the scope of the ATA, *see* Justice Against Sponsors of Terrorism Act, Pub. L. 114-222 (2016), those amendments did *not* allow foreign plaintiffs (such as Petitioners) to bring claims in U.S. courts. Allowing ATS claims brought by foreign plaintiffs arising out of acts of international terrorism to proceed in U.S. court would thus directly contravene Congress' judgment that only U.S. nationals may seek relief for "act[s] of international terrorism" in U.S. courts. 18 U.S.C. §2333.

II. Petitioners' Claims Fail As A Matter Of Law For Several Other Independent Reasons.

Even if the Court were interested in considering the ATS corporate-liability issue despite having denied certiorari on that issue three times in the last two years, and even if Petitioners' claims were not barred by *Kiobel II*, the petition should still be denied as there are multiple additional grounds on which Petitioners' claims fail as a matter of law. *See* Stern & Gressman, Supreme Court Practice 362 (10th ed. 2013) (citing dismissals as improvidently granted where the judgment was "clearly correct on another ground").

A. The ATS Does Not Confer Jurisdiction Over Claims Alleging "Terrorism."

ATS claims are cognizable only for "violations of international law norms that are 'specific, universal, and obligatory.'" *Kiobel II*, 133 S. Ct. at 1665.

> By way of example, Judge Friendly rejected the notion that "the Eighth Commandment

> 'Thou shalt not steal' is part of the law of nations," because, "[w]hile every civilized nation doubtless has this as a part of its legal system," that is insufficient to establish it as a norm of the law of nations; rather, [to be part of international law, a norm] must affect the relationship between states or between an individual and a foreign state, and must relate to the practice of states in their relationships *inter se*.

Mastafa v. Chevron Corp., 770 F.3d 170, 180 (2d Cir. 2014) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.)). It is thus irrelevant whether the alleged acts are universally condemned or even universally illegal under domestic law. The pertinent question is instead whether an action is universally condemned *in international law*. That is a threshold question of law about whether the alleged cause of action is "subject to jurisdiction" under the ATS. *Sosa*, 542 U.S. at 732.

Petitioners assert (at 21) that "the financing and rewarding of terrorism ... lie[s] at the core of the ATS's concerns." But, to the contrary, ATS claims based on "terrorism" "fail ... because no universal norm against 'terrorism' exist[s] under customary international law." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013). Even NATO and the U.N. have struggled to define terrorism, and have failed to do so with any consistency. *See United States v. Yousef*, 327 F.3d 56, 108 n.42 (2d Cir. 2003). The U.S. code contains at least three different definitions of terrorism. *Id.* And the parties to the Rome Conference expressly

withheld jurisdiction over "terrorism" from the International Criminal Court because they failed to agree on a definition of that term. *See* Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 Mich. St. Int'l L. Rev. 219, 223 (2012).

As the Second Circuit explained in another case involving financial services provided to alleged terrorists, "we [have not yet] shaken ourselves free of the cliché that 'one man's terrorist is another man's freedom fighter.' ... [And] terrorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction [under customary international law]." *Terrorist Attacks*, 714 F.3d at 125. This case proves the point. Both sides in the Israeli-Palestinian conflict refer to the other as terrorists. *See Yousef*, 327 F.3d at 106 n.41. And several of the Palestinian organizations and charities that Petitioners have labeled as "terrorist fronts" "received grants *from the United States government*" through USAID, *Gill*, 893 F. Supp. 2d at 561 (emphasis added), and the international donor community.

Nor is the Israeli-Palestinian conflict likely to be the only source of "terrorism" claims under the ATS. Both sides in numerous conflicts around the globe accuse the other of terrorism, including India and Pakistan in their dispute over Kashmir,[7] and Russia

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[7] Salman Masood, *India and Pakistan Accuse Each Other in Deaths of Civilians*, N.Y. Times (Aug. 28, 2015), http://nyti.ms/2hcATaY.

and Ukraine in their ongoing conflict.[8] Opening up U.S. courts to "terrorism" claims under the ATS would create a new front for belligerents worldwide, even in cases where U.S. interests are *de minimis* or non-existent.

B. Petitioners Fail To Plausibly Allege the Requisite Intent and Causation.

1. Since there is no allegation that the Bank has ever directly engaged in terrorism, Petitioners allege that the Bank aided and abetted the attacks that injured them. To prevail on such a claim, Petitioners must show that the Bank acted with the *purpose* of supporting recognized violations of the law of nations, such as genocide and crimes against humanity. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011). An allegation that a company *knowingly* "[did] business with [Hamas or a charity allegedly affiliated with Hamas] ... does not by itself demonstrate a *purpose* to support [genocide or crimes against humanity]." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1025 (9th Cir. 2014) (emphasis added), *cert. denied*, 136 S. Ct. 798 (2016).

Here, any allegation that the Bank acted with the purpose of facilitating crimes against humanity or genocide would be implausible in the extreme. Indeed, the U.S. government has described the Bank as "a constructive partner" and "a lead[er] ... on anti-

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[8] Simon Schuster, *Ukraine and Russia Demonize Each Other With Claims of Terrorism*, Time (Apr. 3, 2014), http://ti.me/1owuokj.

money laundering and combatting the financing of terrorism." U.S. *Linde* Br.20. There can be no plausible allegation that the Bank acted with the purpose of supporting genocide or crimes against humanity when it was working closely with both the U.S. and other governments to fight terrorism and terrorist financing.

2. Finally, Petitioners cannot prevail unless they prove *proximate causation*—that the Bank's actions "led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). But simply providing financial services to persons or charities allegedly affiliated with a terrorist group or related to a terrorist does not *proximately cause* injuries resulting from terrorist attacks. *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013); *Terrorist Attacks*, 714 F.3d at 124. Nor does it demonstrate assistance that "has a substantial effect on the perpetration of the crime." *Presbyterian Church*, 582 F.3d at 257.

For example, in *Rothstein*, the plaintiffs alleged that a defendant bank had provided material support to Hamas and Hezbollah by performing currency exchange services for the government of Iran (which was a designated state sponsor of terrorism). The Second Circuit dismissed those claims for failure to adequately plead either proximate or but-for causation. The court emphasized that Iran also had "many legitimate agencies, operations, and programs to fund," and that there was no plausible allegation that "the moneys UBS transferred to Iran were in fact sent to Hizbollah or Hamas" or that "Iran would

have been unable to fund the attacks ... without the cash provided by UBS." 708 F.3d at 97.

Petitioners' causation theories are even more attenuated. In particular, there are no allegations that any funds that flowed through the Bank were connected in any way to the *specific attacks* that injured Petitioners. Nor do Petitioners make any serious attempt to show that the attacks in question would not have occurred but for the Bank's actions. Plaintiffs' theory of causation thus fails as a matter of law.

CONCLUSION

For the foregoing reasons. this Court should deny the petition for certiorari.

Respectfully submitted,

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